IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA **CASE NO.: 90-CF-11833**

v.

OSCAR RAY BOLIN, **DIVISION: J/TR1**
Defendant.
_____/

FINAL ORDER DENYING CLAIMS I, III, IV, V, AND VI OF DEFENDANT'S MOTION TO VACATE AND SET ASIDE JUDGMENT AND SENTENCE OF DEATH

THIS MATTER is before the Court on Defendant's Motion to Vacate and Set Aside Judgment and Sentence of Death, filed on October 28, 2014, pursuant to Florida Rule of Criminal Procedure 3.851. On December 23, 2014, the State filed its response. On March 2, 2015, the Court held a case management conference and, on April 23, 2015, the Court rendered an order wherein the Court denied claims II and VII of Defendant's motion and granted an evidentiary hearing on claims I, III, IV, V, and VI. On September 3, 2015, the Court held an evidentiary hearing. On October 19, 2015, the parties filed written closing arguments. After considering Defendant's motion and the State's response, the court file and record, as well as the testimony and evidence presented during the September 3, 2015, evidentiary hearing and written closing arguments of counsel, the Court finds as follows.

On November 2, 2006, a jury found Defendant guilty of first degree murder and, on November 30, 2007, the trial court imposed a death sentence.[1] Defendant's conviction and sentence were affirmed. *Bolin v. State*, 117 So. 3d 728 (Fla. 2013), *cert. denied*, 134 S. Ct. 695 (2013).

[1] Defendant was twice previously convicted and sentenced to death in this case; the first two convictions and death sentences were reversed and remanded for new trials. *See Bolin v. State*, 650 So. 2d 21 (Fla. 1995); *Bolin v. State*, 793 So. 2d 894 (Fla. 2001).

In the instant motion, Defendant alleges ineffective assistance of counsel. In *Strickland v. Washington*, 466 U.S. 668 (1984), the U.S. Supreme Court provided the following standard for determining ineffective assistance of counsel:

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.
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> . . . .
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> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing the errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 686-687. To prove counsel performed deficiently, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-688. As to prejudice, the test is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

CLAIM I

Mr. Bolin Suffered Ineffective Assistance of Counsel When His Counsel Declined to Object to the State's Failure to Disclose Evidence of the "724-BYL, Ray" Note, Declined to Request a *Richardson* Hearing, and Failed to Move for a Mistrial When the Evidence Was Presented to the Jury During Closing Arguments.

CLAIM III

Mr. Bolin Suffered Ineffective Assistance of Counsel as a Result of His Counsel's Failure to Investigate the Contents of The Purse Prior to Trial.

Allegations and Responses

Due to the nature of the claims, the Court will address claims I and III together. In claim I, Defendant alleges counsel performed deficiently by failing to object or move for a *Richardson* hearing or a mistrial based upon the State's failure to disclose evidence of a note reflecting "724-BYL, Ray" which was found inside the victim's, Stephanie Collins, purse. Defendant alleges trial counsel stipulated the purse and its contents belonged to Ms. Collins, and the purse and its contents were entered into evidence. The note was never mentioned during the State's case or in any of the previous trials, and the first time Defendant had ever heard of the note was during the State's closing argument when the State pulled the note from the purse and argued a scenario not in evidence, specifically, that Ms. Collins had a previous "fender bender" run-in with Defendant when she took down his license plate and name.

Defendant asserts the State had an obligation to disclose the note under rule 3.220(b)(1) and particularly rule 3.220(b)(1)(K), which requires the State to disclose "any tangible papers or objects that the prosecuting attorney intends to use in the hearing or trial and that were not obtained from or that did not belong to the defendant." Defendant posits that the State's generic discovery disclosures never referenced the note, therefore, the State committed a discovery violation by failing to disclose the note. Defendant further asserts counsel failed to bring this discovery violation to the trial court's attention and did not request a *Richardson* hearing. Defendant contends that if counsel had requested such a hearing, then the trial court would have found a discovery violation had occurred and excluded evidence of the note. Defendant further asserts that given the evidentiary significance of the note, the State's "elaborate argument related thereto, and the irreparable harm that resulted from the jury's exposure to the evidence and argument, a mistrial

would have been an appropriate sanction..." Defendant asserts the trial court would have at least deemed the evidence and argument inadmissible and stricken them from the record. Defendant contends that if counsel had objected to the note, requested a *Richardson* hearing or moved for a mistrial, there is a reasonable probability that the trial would not have resulted in a guilty verdict.[2]

In its response, the State argues the record reflects counsel was aware of the existence of the purse and that the State was going to introduce the purse and its contents into evidence, and counsel did not object. Counsel further stipulated that the purse and all its contents belonged to the victim. Counsel was aware of the purse as well as forensic testing conducted on the purse, and had ample time to inspect the purse and its contents before trial; therefore, Defendant cannot complain the State failed to disclose this information and counsel had no legal basis to allege a discovery violation. The State further contends it is not required to "specify every single piece of a composite exhibit when it otherwise makes the exhibit available to counsel."

The State further argues even if counsel had requested a *Richardson* hearing the trial court would have determined that no discovery violation occurred because the purse and its contents were known and available to counsel. The State also contends that even if the trial court determined that a discovery violation occurred, it would not have excluded this evidence because it did not have any prejudicial effect on Defendant's trial preparation. The State further contends that counsel was not ineffective for failing to object to the State's argument regarding the note because the purse and its contents were properly admitted into evidence and therefore there was "no valid legal basis to object to the prosecutor's argument during closing regarding the common-sense explanation for the note." Finally, the State contends that even if counsel was ineffective,

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[2] Defendant also argues that if counsel had objected, requested a *Richardson* hearing and moved for mistrial, he would have preserved the issues for appellate review. However, in its April 23, 2015 order, the Court found Defendant has not demonstrated the necessary prejudice under *Strickland* and cited *Strobridge v. State*, 1 So. 3d 1240 (Fla. 4th DCA 2009).

Defendant cannot demonstrate prejudice because the evidence of guilt was overwhelming and the note showing the victim's prior contact with Defendant did not undermine confidence in the outcome of the proceedings.

In Claim III, Defendant alleges trial counsel performed deficiently by failing to inspect the contents of the victim's purse before trial. Defendant asserts that counsel apologized to him and told him "This is on me...my mistake...I never reviewed the evidence or purse before trial started. You now have an I.A.C. issue for appeal." Defendant argues that if counsel had inspected the contents of the purse before trial, he would have discovered the existence of the note and investigated its discovery. Defendant contends counsel would have been prepared to question law enforcement regarding its failure to discover the note in the decades the case has been pending, and rebut the State's closing argument regarding the significance of the note and show the State's hypothetical scenario was unviable. Defendant asserts that if not for counsel's failure to investigate the contents of the victim's purse, there is a reasonable probability that the trial would have resulted in a different verdict.

In his written closing argument after the evidentiary hearing, Defendant further argues the outcome of the proceeding would have been different where counsel could have discredited the State's theory regarding the note and created reasonable doubt as to the alleged connection between the note and the murder. Defendant cites to his highly qualified previous trial counsels' testimony that they would have examined the purse and its contents but did not see the note at issue. Defendant further cites to the fact that an entire task force investigated Defendant's cases and the purse was sent to the FBI where it was inventoried and underwent forensic testing, but the note was still not discovered in more than two decades. Defendant asserts counsel could have presented testimony of individuals who reviewed the purse and its contents but never discovered the note,

cited to differences between the writing on the note and other writing on the paper, and testimony that scratches on the victim's car came from the victim's brother.

In its response, the State argues that Defendant cannot demonstrate prejudice and it is therefore not necessary to address counsel's alleged deficient performance. The State asserts that in closing argument counsel already made the argument regarding law enforcement's failure to discover the note, thereby refuting his only allegation of prejudice. The State argues that counsel was not ineffective for failing to object to the note as there was no basis for such an objection and counsel would not have been able to rebut the State's argument, which was a common-sense inference made from the evidence.

In its written closing argument after the evidentiary hearing, the State further contends Defendant failed to demonstrate trial counsel performed deficiently where counsel inspected the purse and its contents before trial and therefore did not perform 'outside the broad range of competent performance under prevailing professional standards.' The State further contends counsel failed to demonstrate the outcome of the proceedings would have been different where the note and evidence of Defendant's tag number would still have been admissible evidence.

Evidentiary Hearing

At the evidentiary hearing, Defendant's previous trial counsels for his first and second trials of this case testified in this matter. The parties also stipulated to the submission of the August 28, 2015 deposition transcript of the Honorable Paul Firmani. (*See* September 3, 2015 transcript, p. 95). Judge Firmani, currently a county judge in Pasco County, served as guilt phase counsel during Defendant's first trial in this case in October 1991.[3] (*See* Defense Exhibit #13, pp. 3-5). Judge Firmani testified that as competent counsel, he and/or co-counsel would have viewed the

[3] Lead counsel, Charles O'Connor, Esquire, is deceased.

physical evidence in this case, but he did not have any independent recollection of having done so because he represented Defendant almost twenty-four years ago. (*See* Defense Exhibit #13, pp. 4-6). He also did not recall co-counsel ever referencing the purse or note. (*See* Defense Exhibit #13, pp. 6-7). Although Judge Firmani did not recall seeing the note, he testified that if he had seen the note "it would have set off some bells" and his client was known as "Ray." (*See* Defense Exhibit #13, p. 6). Judge Firmani further testified that he would have wanted to investigate the note and, hypothetically, if he had discovered the note at issue, he "would have noted it, discussed it with co-counsel and prayed that the prosecution did not find it." (*See* Defense Exhibit #13, p. 7-8).

During the September 3, 2015 evidentiary hearing, the Honorable Mark Ober, currently the elected State Attorney for the Thirteenth Judicial Circuit, testified that he represented Defendant during the second trial of this case in April 1999. (*See* September 3, 2015 transcript, pp. 74-75). Mr. Ober testified that he would customarily view physical evidence in preparation for a capital murder case, but he did not have any independent recollection as to whether he viewed the evidence in this case. (*See* September 3, 2015 transcript, p. 77). Mr. Ober recalled that a purse was found near the victim's body and he was aware of the purse, and recalled that the purse was referenced in both the previous trial transcripts, police reports and property receipts. (*See* September 3, 2015 transcript, pp. 77-78, 81-82). Mr. Ober testified he was familiar with State's Exhibit #1, a HCSO property receipt for the victim's property, which listed as item number 12, "SILVER COLORED DRAW STRING PURSE WITH MISC. CONTENTS." (*See* September 3, 2015 transcript, pp. 81-83; State's Exhibit #1). He further testified that prior to and during his representation of Defendant, he was not aware of the note at issue; after having been shown the actual note during the evidentiary hearing,[4] Mr. Ober testified he had not previously seen the note,

[4] The actual note was shown during the evidentiary hearing but a copy was introduced as State/Defense Stipulated Exhibit #1. (*See* State/Defense Stipulated Exhibit #1).

agreed that it would be a significant piece of evidence, and that if he had previously seen the note he would have remembered it. (*See* September 3, 2015 transcript, pp. 78-79). Mr. Ober testified that if he had found the note, he would have discussed it with co-counsel and his client. (*See* September 3, 2015 transcript, p. 87). He may also have submitted it for independent analysis, but due to the potentially damning nature of the note, another approach might be to do nothing. (*See* September 3, 2015 transcript, pp. 87-90). He also acknowledged that other possible but unlikely explanations as to why the note was not discovered for twenty years, include that the note was not there originally but subsequently placed there or that someone in law enforcement may have subsequently and inadvertently written Defendant's information on a paper that was inside the purse. (*See* September 3, 2015 transcript, pp. 91-94).

During the September 3, 2015 evidentiary hearing, David Parry, Esquire, Defendant's trial counsel who is the subject of the instant proceeding, testified that he has been a criminal defense attorney for thirty-one years and is board-certified. (*See* September 3, 2015 transcript, p. 98). Mr. Parry represented Defendant in both the instant case as well as a second Hillsborough County murder case involving victim Natalie Holley. (*See* September 3, 2015 transcript, pp. 99-100). Mr. Parry testified that he and Rosalie Bolin, Defendant's wife and investigator in this case, viewed the physical evidence in Defendant's cases at the Hillsborough County Sheriff's Office. (*See* September 3, 2015 transcript, pp. 99, 111). The evidence they viewed was voluminous and contained in several boxes, including boxes for each of Defendant's cases as well as boxes for the Task Force that was involved in the investigation of Defendant's cases. (*See* September 3, 2015 transcript, pp. 99-101). Although it appeared Mr. Parry initially indicated there may have some commingling of evidence, he later testified that he did not recall any specific commingling of

evidence and just recalled that "everything was out there." (*See* September 3, 2015 transcript, pp. 100-101, 114-15). Mr. Parry also recalled that a detective stood by as they viewed the evidence and that detective would cut open items that had not previously been opened. (*See* September 3, 2015 transcript, p. 115).

Mr. Parry specifically recalled putting on gloves, and inspecting the purse and its contents, including pieces of paper in the purse. (*See* September 3, 2015 transcript, pp. 101-2). Mr. Parry testified as follows:

> [MR. PARRY]: And that the purses, we were allowed to open them and then pull everything out. And I remember like pulling out the pieces of paper and going through them, but I don't remember seeing if that -- if that piece of paper that was brought out during trial was in the purse, I don't remember seeing it, okay. Because I don't -- I would recollect that if I recognized what it was, I would certainly have remembered that, but I don't remember -- again, since I don't remember it, or seeing it, then I don't know if it was in the purse or not, but I did go through all that we opened up and unfolded things, and folded them back up and put them back in the purse.

(*See* September 3, 2015 transcript, p. 102). Mr. Parry did not recall seeing that note until the trial. (*See* September 3, 2015 transcript, p. 102). Mr. Parry further testified,

> [THE STATE]: And as you sit here today, you have no specific recollection of the handwriting on the back of the note; is that correct?
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> [MR. PARRY]: Well, it's not that I don't have a recollection of it. I know that -- my recollection is that I did not -- if that piece of paper was in there with that, that either for some reason I didn't turn the paper over and read it, or I read it and didn't understand its significance, or it wasn't there. I don't remember -- if I had seen it and recognized what it was, it would be something I would remember.
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> [THE STATE]: All right.
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> [MR. PARRY]: But I don't remember that note in the purse. I remember going through the purse and opening up the pieces of paper, looking at them, closing them back up, putting them back in.

(*See* September 3, 2015 transcript, p. 116).

Mr. Parry further testified that opposing counsel, Assistant State Attorney Michael Halkitis never specifically disclosed the note at issue. (*See* September 3, 2015 transcript, p. 107-8). Mr. Parry was not sure whether the State was legally obligated to specifically disclose the note but Mr. Parry acknowledged that he was aware of the purse and its contents, and he not only had the opportunity to, but actually inspected the purse and its contents. (*See* September 3, 2015 transcript, pp. 109-10, 115-16). Mr. Parry also testified that the contents of the purse appeared to be the normal contents of a young woman's purse and, as he was not aware of the note, the purse was not significant to him and he focused more on the other evidence against Defendant rather than the purse. (*See* September 3, 2015 transcript, pp. 116-117, 119).

During the evidentiary hearing, Assistant State Attorney Mike Halkitis testified that he was appointed to work on Defendant's Hillsborough County cases in 2002. (*See* September 3, 2015 transcript, pp. 128-29). When preparing for trial in the instant case, Mr. Halkitis viewed the silver purse found on the victim's body. (*See* September 3, 2015 transcript, pp. 130-31). Mr. Halkitis described numerous references to the purse and its contents in trial transcripts, police reports and a property receipt, and lab reports. (*See* September 3, 2015 transcript, pp. 131-32). Mr. Halkitis testified that he discovered the note approximately two weeks before the trial began, when he inspected the purse and its contents in his office. (*See* September 3, 2015 transcript, p. 133). He first noticed the piece of paper which contained what appeared to be a high school student's notes, and when he turned the paper over, he noticed the "Ray" and tag number notation; Mr. Halkitis recognized that the tag number belonged to Defendant's 1986 Ford pickup truck and Defendant was known as "Ray." (*See* September 3, 2015 transcript, pp. 133-34). Mr. Halkitis testified that he considered whether he had to disclose the note, and checked to see whether the purse and its contents had previously been disclosed. (*See* September 3, 2015 transcript, p. 143).

He then realized he did not need to do disclose the note because "there was just a ton of materials, a ton of materials that listed the purse and its contents." (*See* September 3, 2015 transcript, p. 148). Mr. Halkitis also acknowledged that the victim's brother took responsibility for a scratch on the side of the victim's car. (*See* September 3, 2015 transcript, p. 154).

A review of State/Defense Stipulated Exhibit #1 reflects that it is a copy of a three-hole punched, wrinkled, faded lined sheet of paper, which contains notes regarding HUD and FAA on one side, and the notation "724-BYL Ray" on the other side. (*See* State/Defense Stipulated Exhibit #1). State's Exhibit #1 is a HCSO property receipt for the victim's property, dated December 10, 1986, and reflects a "SILVER COLORED DRAW STRING PURSE WITH MISC. CONTENTS" was listed as item number 12. (*See* State's Exhibit 1). Defense Exhibit #4, an FBI laboratory report, dated January 29, 1987, also lists as item Q4 "silver draw string purse (Exhibit #12)." (*See* Defense Exhibit #4). Defense Exhibit #5 is a FBI laboratory work sheet, dated December 8, 1986, which lists as item Q4 "silver draw string purse (Exhibit #12)" and then appears to inventory or list the contents of Q4, including a "piece of white lined notebook paper." (*See* Defense Exhibit #5).

Findings of Fact and Conclusions of Law

As to Claim I, when conducting a *Richardson* inquiry, "the trial judge must first determine whether a discovery violation occurred." *Sinclair v. State,* 657 So.2d 1138, 1140 (Fla.1995). The Court finds the testimony of Mr. Parry to be credible. The Court finds it is unrefuted that trial counsel was well aware of the existence of the purse and its contents. Mr. Parry testified that he was not only aware of the purse, but that he personally inspected the purse and its contents, including various pieces of paper inside the purse. Consequently, the Court finds that no discovery violation occurred as to the note. *See e.g., Taylor v. State*, 62 So. 3d 1101, 1112 (Fla. 2011) (finding State did not conceal witness's identity where it provided counsel a report with the

witness's initials and counsel was therefore aware of the witness's existence, and finding counsel was not ineffective for failing to request a *Richardson* hearing).

Additionally, the Court notes that '[t]he proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence.' *See Gonzalez v. State*, 136 So. 3d 1125, 1143 (Fla. 2014) (quoting *Bertolotti v. State*, 476 So.2d 130, 134 (Fla.1985)). "Merely arguing a conclusion that can be drawn from the evidence is permissible fair comment." *Griffin v. State*, 866 So. 2d 1, 16 (Fla. 2003). The State's closing argument about the note was permissible where the State was arguing a conclusion that could reasonably be drawn from the evidence, therefore, counsel had no basis to object to the State's closing argument. *See Deparvine v. State*, 146 So. 3d 1071, 1093 (Fla. 2014) ("Trial counsel cannot be ineffective for failing to pursue meritless arguments.").

Moreover, "A motion for mistrial should be granted only where prejudicial error will vitiate the trial's result, making a mistrial necessary to ensure that the defendant receives a fair trial." *McGirth v. State*, 48 So. 3d 777, 790 (Fla. 2010). The Court further finds Defendant has failed to demonstrate that a mistrial was necessary to ensure a fair trial as no discovery violation occurred and the State's argument was permissible. Therefore, even if counsel had objected to the note or closing argument about the note, or moved for a *Richardson* hearing or a mistrial, the trial court would not have sustained the objection or found that a discovery violation occurred or that a mistrial was warranted.

Finally, the Court notes that even if the trial court had found a discovery violation and excluded or stricken the note from evidence and argument, there was still considerable evidence of Defendant's guilt. Defendant's ex-wife, Cheryl Coby, testified[5] that on the evening of

[5] Ms. Coby is deceased; her prior testimony was read and played back to the jury.

November 5, 1986, Defendant took her to their travel trailer. (Trial Tr., vol.3, pp. 448-52). At that time, she was still married to Defendant but staying with another couple while Defendant was staying at the travel trailer. (Trial Tr., vol.3, pp. 444-49). Defendant backed the pick-up truck to the trailer and, as she waited inside their pickup truck while Defendant went into the travel trailer, Ms. Coby saw Defendant pick up something wrapped in her quilt, toss it over his shoulder and then place it in the back of the pickup truck. (Trial Tr., vol.3, pp. 452-54). Defendant then drove them to Morris Bridge Road, where he stopped, got out of the truck and she saw him take the body out of the truck and throw it into a ditch. (Trial Tr., vol.3, p. 455). They went back to the travel trailer and Ms. Coby went inside the travel trailer to get a change of clothing and other items, and she noticed everything inside was wet, including the floor, ceiling, cabinet, and doors. (Trial Tr., vol.3, pp. 455-56). She also noticed blood in areas on the curtains, carpet and wall. (Trial Tr., vol.3, p. 456). She saw her butcher knife, which was normally kept in the bottom drawer, out beside the sink and the handle was wet. (Trial Tr., vol.3, pp. 456-57). Ms. Coby identified the quilt, sheets and towels wrapped around the victim's body as her quilt and sheets and towels that she had brought home from previous hospital stays. (Trial Tr., vol.3, pp. 375-81, 453-54, 457-58). Ms. Coby showed law enforcement where the body was dumped and provided towels similar to those found wrapped around the victim. (Trial Tr., vol.3, pp. 461-62; vol. 4, pp. 491-93, 541-43). A hair found inside the towel wrapped around the victim's body exhibited the same microscopic characteristics as Defendant's hair and was consistent with originating from Defendant; mitochondrial DNA testing of that hair showed Defendant had the same mitochondrial DNA profile, such a profile is seen in less than 1% of the population, and it is 916 times more likely that the hair is from Defendant or a maternally derived relative than a random person in the population.

(Trial Tr., vol.5, pp. 575-82, 604, 632-38, 646-47). The medical examiner testified[6] that the victim's skull was struck hard several times and there were six stab wounds. (Trial Tr., v. 3, pp. 424-35). Other testimony reflected the victim was last seen in the passenger seat of a white commercial van driven by a man, and Defendant had access to and was previously seen driving a white commercial van. (Trial Tr., vol.5, pp. 659-95). Defendant also attempted to commit suicide while incarcerated at the county jail on the instant case and left a note referencing the instant case. (Trial Tr., vol.4, pp. 543-47). In light of the overwhelming evidence against Defendant, the Court finds there is not a reasonable probability the verdict would have been different even if counsel had objected or moved for a *Richardson* hearing and the trial court had stricken or excluded the note at issue.

For the aforementioned reasons, the Court finds Defendant has failed to show that counsel performed deficiently by failing to object to the note or the State's closing argument, move for a *Richardson* hearing or request a mistrial based on the State's alleged failure to disclose the note at issue, or that the result of the proceeding would have been different had counsel done so. **No relief is warranted on claim I.**

As to claim III, to the extent Defendant is alleging counsel was ineffective for failing to inspect the purse and its contents, the Court finds Defendant has failed to demonstrate that trial counsel failed to inspect the purse and its contents. The Court finds Mr. Parry's testimony is credible and unrefuted. The Court finds Mr. Parry personally inspected the purse and its contents, including various papers inside the purse. Therefore, the Court finds Defendant has failed to demonstrate counsel was ineffective for failing to inspect the purse.

[6] The medical examiner's previous testimony was read to the jury.

To the extent Defendant is alleging counsel was ineffective for failing to adequately examine the contents of the purse and discover the note, the Court finds Defendant has failed to demonstrate that he was prejudiced by counsel's failure to discover the note. Although the State entered the note into evidence and referenced the note in closing argument, the Court finds Defendant has failed to show that the result of the proceedings would have been different had counsel discovered the note. Previous counsels testified they may not have done anything about the note and hoped the State did not discover it, and Mr. Parry testified that he would have wanted to investigate and discredit the tag and name on the note. The Court agrees with the State's argument that the note and evidence of Defendant's ownership of the tag and vehicle was still admissible. Defendant has not presented sufficient evidence that would discredit the tag and the name on the note or that it was the victim's notation. The Court further agrees with the State's argument that although the victim's brother acknowledged responsibility for a scratch on the victim's car, that did not affect the State's ability to argue the fender bender hypothesis as the State also noted in its argument there were various areas of damage to the car. (Trial Tr., v. 6, pp. 751-52). Although Defendant posits that counsel could have put on evidence or argued the note did not exist at the time of the homicide as well as the unviability of the State's fender bender hypothesis, the Court finds Defendant has failed to demonstrate a reasonable probability that the outcome of the proceeding would have been different had counsel discovered the note at issue. Additionally, as discussed in claim I above, in light of the overwhelming evidence against Defendant, Defendant has failed to show that the outcome of the proceeding would have been different even if counsel had discredited the note at issue or the State's hypothesis regarding the note. As Defendant has failed to meet the prejudice prong, it is not necessary to address whether counsel was ineffective for failing to discover the note. *See Waterhouse v. State,* 792 So. 2d 1176, 1182 (Fla. 2001) ("[B]ecause the *Strickland* standard requires establishment of both prongs, when

a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong."). **No relief is warranted on claim III.**

CLAIM IV

Newly Discovered Evidence of the Prior Bad Acts of FBI Agent Michael Malone and the Probable Tampering That Occurred During Malone's Handling of the Physical Evidence That Would Be Used Against Mr. Bolin.

Allegations and Response

In Claim IV, Defendant alleges newly discovered evidence. Specifically, Defendant alleges that a new report by the United States Department of Justice (USDOJ) Office of the Inspector General issued in 2014 (2014 OIG report),[7] is newly discovered evidence that Michael Malone, the FBI analyst who collected and analyzed hair evidence in this case, tampered with or caused the contamination of hair evidence in this case.

Defendant alleges evidence was admitted at trial regarding the testing of hair found on physical evidence collected from one of the towels wrapped around the victim's body. The expert testimonial evidence showed that hair was compared to Defendant's known hair samples, and was consistent with having originated from Defendant. Defendant further alleges hairs from the towel were collected and testing was performed in 1990 by Mr. Malone. At the time of the instant trial, Mr. Malone had retired and the State therefore presented evidence of the hair comparison analysis through a substitute agent, who was not present when Malone prepared and tested the samples. The substitute agent further testified that only one suitable hair, which was prepared on a slide by Mr. Malone, was examined. Defendant further alleges that during cross-examination, counsel

[7] United States Department of Justice Office of the Inspector General, *An Assessment of the 1996 Department of Justice Task Force Review of the FBI Laboratory* (July 2014).

referenced a 1997 OIG report,[8] but on redirect, the State questioned whether the 1997 OIG report indicated Mr. Malone had done anything improper in this case, and the agent answered that it did not and the report did not reference Mr. Malone's work in hair and fiber analysis. Defendant alleges the examiner further testified that if Mr. Malone had made an error or false entry in the bench notes the examiner would have no way of knowing whether the entry is true or accurate and would have no way of knowing that an error or falsification had occurred.

Defendant further contends that mitochondrial DNA testing was performed on the same hair sample collected and prepared by Mr. Malone and compared to Defendant's mitochondrial DNA. The State's evidence at trial showed that the samples shared a profile found in less than 1% of the sample Caucasian population database used in the study. Defendant also contends the State did not present evidence of the chain of custody for the physical evidence in the FBI's possession.

Defendant asserts that the instant issue came to light on January 14, 2014, when counsel received an email from the USDOJ forwarding correspondence that had been sent to prior postconviction counsel regarding the 1997 OIG report. Defendant received another email in April 2014 further informing counsel that in 1999 the State advised the 1996 FBI Task Force that Mr. Malone's work was not material to the verdict in either the Matthews, Collins or Holley cases and, as a result, Mr. Malone's work in those cases was not subjected to independent scientific reviews.

Defendant asserts that on July 30, 2014 counsel received another email from USDOJ regarding the 2014 OIG report, wherein the OIG undertook a review of the 1996 FBI Laboratory Task Force. That report concluded the FBI Task Force should have reviewed all cases involving Mr. Malone, and that his 'faulty analysis and scientifically unsupportable testimony' contributed

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[8] United States Department of Justice Office of the Inspector General, *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases* (April 1997).

to the conviction of an innocent defendant and the reversal of at least five other convictions. Additionally, the report reflects independent reviewers concluded that in 94% of Mr. Malone's cases, either the appropriate forensic test was not conducted or it was impossible to determine whether he conducted the appropriate test; in 94% of cases, the results described in his lab reports were not supported by his bench notes; and in 54% of cases where testimony was available, his testimony was inconsistent with his lab reports and in 65% of the cases his testimony was inconsistent with his bench notes. Defendant posits that based on such information, documentation establishing that Mr. Malone alone prepared and handled all of the physical evidence that was tested in this case, and the State's failure to establish a chain of custody of the physical evidence in this case, there is a "strong probability that Malone tampered with or otherwise caused the contamination of the physical evidence that was the subject of hair comparison and mitochondrial DNA testing at issue in this case." Defendant further claims there is no other physical evidence linking him to the instant offense.

Defendant further cites as corroboration that Steven Kasler, an Ohio inmate, has recently confessed to the murder of Teri Matthews, another murder for which Defendant was convicted in Pasco County. Defendant posits that because the instant murder was allegedly committed by the same person who killed Ms. Matthews, there is a strong probability that Kasler also committed the instant offense.

Defendant asserts neither he nor trial counsel was aware of the tampering/contamination issue until contacted by the USDOJ. Defendant further claims that given the significance of the hair and DNA evidence in this case, along with "the magnitude and extent of Malone's prior bad acts," such newly discovered evidence would probably produce an acquittal on retrial or weaken the State's case to such an extent as to give rise to reasonable doubt.

In its response, the State contends counsel was aware of the 1997 OIG report as well as a second OIG report, and cross-examined the examiner who testified at trial, FBI analyst Robert Fram, on this issue; therefore the evidence is not "newly discovered" and is procedurally barred. The State further asserts Mr. Fram did not simply testify as to Malone's results but rather Mr. Fram re-analyzed the hair evidence at issue. Mr. Fram testified that the FBI received item "Q22," hairs recovered from the towel wrapped around the victim's body and known hairs from Defendant, and his testimony clearly established that he conducted his own microscopic comparison analysis and found the hair obtained from the towel exhibited the same microscopic characteristics as Defendant's. Mr. Fram acknowledged that he only compared the Q22 slide, which was represented by Malone as having come from the towel; he had Malone's bench notes and testified that he did not see anything of concern, nor any evidence of contamination or chain of custody violations. Mr. Fram then cut a portion of the hair from the Q22 slide for mitochondrial DNA testing. Counsel cross-examined Mr. Fram regarding the OIG report and Malone's alleged misconduct.

The State also asserts the 2014 report is not newly discovered evidence and cites to previous court orders. The State contends Defendant's claim regarding tampering or contamination is speculative and conclusory, and without any evidentiary support.

As to Defendant's claim regarding Kasler's confession to the Pasco County murder of Teri Lynn Mathews, the State contends such allegation is "incredible" and there is no support for Defendant's claim. The State also argues as to the unreliability of Kasler's alleged confession because he is notorious for confessing to murders he didn't commit. In support, the State attaches a copy of exhibits entered in the clemency hearing of Dennis McGuire, an inmate with whom Kasler conspired to take responsibility for the murder committed by McGuire.

Evidentiary Hearing

At the September 3, 2015 evidentiary hearing, the defense presented the testimony of Frederick Whitehurst, the former FBI laboratory analyst whose allegations of improper conditions and acts of misconduct prompted a U.S. Department of Justice Office of the Inspector General investigation into the FBI laboratory. (*See* September 3, 2015 transcript, pp. 9-15). Mr. Whitehurst opined that he would find unreliable or incredible any evidence that Malone touched or any work that Malone produced. (*See* September 3, 2015 transcript, pp. 43-45, 52, 58, 63). Mr. Whitehurst cited to his own and previous investigations of Mr. Malone, as well as another colleague who advised him that evidence in Mr. Malone's custody had been altered. (*See* September 3, 2015 transcript, pp. 43-45). Mr. Whitehurst further testified that he has never reviewed any evidence in this case. (*See* September 3, 2015 transcript, p. 48). Mr. Whitehurst clarified that he is not testifying Mr. Malone actually altered, transferred or substituted the hair evidence at issue in this case, but it was his "understanding" that Mr. Malone "could do something like that." (*See* September 3, 2015 transcript, pp. 52-53). Mr. Whitehurst agreed that he had no evidence that Mr. Malone transferred, altered, or substituted the hair evidence at issue in this case. (*See* September 3, 2015 transcript, p. 53).

Additionally, for purposes of the September 3, 2015 evidentiary hearing, the Court admitted a redacted version of the 2014 OIG report. (*See* September 23, 2015 Order on Defense Exhibit #3, Defense Exhibit #3).

Findings of Fact and Conclusions of Law

In order to obtain relief based on newly discovered evidence, the Florida Supreme Court has set forth the following two-prong test:

> First, in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence."

> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.

Jones v. State, 709 So. 2d 512, 521 (Fla. 1998) (internal citations omitted). "The newly discovered evidence, when considered together with all other admissible evidence, must be of such nature that it would probably produce an acquittal on retrial, a standard that is satisfied if the newly discovered evidence 'weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability.'" *Hildwin v. State,* 141 So. 3d 1178, 1188 (Fla. 2014) (quoting *Jones*, 709 So. 2d at 526).

The Court does not find credible Dr. Whitehurst's testimony that any evidence touched by or that was ever in the custody of Mr. Malone is unreliable, worthless or without evidentiary value. As Dr. Whitehurst acknowledged, there is no evidence that Mr. Malone altered, tampered with, or substituted evidence in this case. The Court further finds that the 2014 OIG report does not contain any finding that Mr. Malone transferred, contaminated, or substituted physical evidence in this or any other case. The Court finds Defendant's allegations that the 2014 OIG report constitutes newly discovered evidence that Mr. Malone must have tampered with or substituted the hair evidence in this case is unsubstantiated, speculative and conclusory. The Court further finds that Defendant failed to present any evidence regarding Kasler's confession to the Pasco County murder of Teri Mathews. Therefore, as to Defendant's allegations that Kasler's confession to the Matthews murder indicates a strong probability that he also committed the instant offense, the Court finds such allegations are likewise wholly unsubstantiated, speculative and conclusory.

The crux of Defendant's argument is that Mr. Malone tampered with, substituted or contaminated the hair evidence in this case, and the 2014 OIG report substantiates his argument or at least weakens the case against Defendant so as to create reasonable doubt as to his culpability.

However, the Court notes that the extent of Mr. Malone's involvement in this case at trial is his purported collection of the hair from the towel. Mr. Fram did not merely testify to Mr. Malone's previous findings, but Mr. Fram conducted his own analysis of the hair collected by Mr. Malone and reached his own conclusions. (Trial Tr., v. 5, pp. 578-82, 594). Mr. Fram also reviewed Mr. Malone's benchnotes and did not find anything out of the ordinary or anything that would concern him as to contamination or chain of custody. (Trial Tr, v. 5, pp. 608-9). As aforementioned, the 2014 OIG report does not contain any finding that Mr. Malone transferred, contaminated, or substituted physical evidence in this or any other case. The Court further notes that trial counsel had the 1997 OIG report and referenced it during cross-examination of Mr. Fram. (Trial Tr., v.5, pp. 587-607, 617-620). Although the 1997 OIG report does not discuss Mr. Malone's problematic work product to the extent found in the 2014 OIG report, the jury was still aware of Mr. Malone's misconduct and the need to have his work independently reviewed. Finally, the Court notes that trial counsel argued these issues extensively in closing argument. (Trial Tr., vol. 6, pp. 798-810).

Based on the foregoing, the Court finds Defendant has failed to demonstrate that the purported newly discovered evidence at issue here is of such a nature that it would probably produce an acquittal on retrial or weakens the case against Defendant to such an extent that it gives rise to a reasonable doubt as to his culpability. **No relief is warranted on claim IV.**

CLAIM V

The State's Failure to Disclose Information Regarding Malone's Misconduct and the Investigation into His Work Violated the State's Duty to Disclose Favorable, Material Evidence Pursuant To *Brady v. Maryland.*

Allegations and Response

In claim V, Defendant alleges the State committed a *Brady*[9] violation when it was aware of ongoing issues regarding Mr. Malone as early as 1998, but failed to disclose such information to the defense. Defendant asserts he was notified by the USDOJ in January 2014 that the State advised the FBI Task Force in 1999 that Malone's work was not material to the verdicts in the Mathews, Collins or Holley cases. Defendant asserts that in reviewing the State's file in another of Defendant's cases, he learned that the USDOJ had contacted the State in March 1998 in reference to its ongoing investigation of Malone. Defendant claims that despite knowing of the investigation into Malone, the State failed to disclose to Defendant the following: (a) evidence of the ongoing investigation; (b) evidence that Malone apparently handled the physical evidence that was submitted for forensic testing; or (c) evidence of communications between USDOJ and the State. Defendant further asserts that at trial, the State minimized "the magnitude and scope of the allegations of misconduct against Malone" although his suspected acts of misconduct were known to the State or its agents at the time of trial.

Defendant contends the State had an obligation to disclose available evidence and its failure to do so resulted in a *Brady* violation. Defendant asserts the evidence meets the *Brady* prongs where evidence regarding the Malone investigation is exculpatory; the State was aware of the ongoing investigation as early as 1998 but failed to disclose it; and the evidence is material because it calls into question the accuracy and the weight of all of the physical evidence submitted against Defendant. Defendant further asserts that if the evidence had been previously disclosed, there is a reasonable probability that the jury would not have found Defendant guilty.

In its response, the State contends that trial counsel was aware of and had the 1997 OIG report as well as a second report and Mr. Malone's bench notes, therefore, the information was

[9] *Brady v. Maryland*, 373 U.S. 83 (1963).

disclosed to counsel. The State further posits that Defendant cannot demonstrate prejudice because counsel used the 1997 OIG report to cross-examine Mr. Fram and argue in closing that the forensic testing was unreliable. The State asserts the OIG report is inadmissible hearsay and Defendant has failed to attach any exhibits that would have been admissible at trial, and there is no probability the results would have been different.

In its closing argument, the State further contends Defendant failed to present any evidence as to this issue and has therefore failed to establish a *Brady* violation.

Findings of Fact and Conclusions of Law

In order to establish that a *Brady* violation has occurred,

> [A] petitioner has the burden of proving that (1) the evidence at issue is favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) prejudice to the defendant has ensued. . . . A petitioner has the burden of demonstrating each prong of a *Brady* violation.

Archer v. State, 934 So. 2d 1187, 1202 (Fla. 2006) (internal citations omitted).

The Court agrees that Defendant has failed to present sufficient evidence to establish that a *Brady* violation occurred. The record reflects counsel was aware of and had a copy of the 1997 OIG report as well as a second report, and was aware of issues with Mr. Malone's work as well as continued review and re-analysis of Malone's work after the 1997 OIG report; counsel cross-examined Mr. Fram on the OIG report and issues with Malone's work and subsequent review and re-analysis of Malone's work. (September 3, 2015 transcript, pp. 124-25; Trial Tr. v. 3, pp. 334-37, 368-70; Trial Tr. v.5, pp. 587-607, 617-620; vol.6, pp. 798-810). Defendant has not presented any specific evidence to establish what the State disclosed or failed to disclose or what information Defendant or trial counsel received or failed to receive from the State. Defendant has not presented any testimony or evidence that the State withheld evidence or that trial counsel was not aware of

evidence of the ongoing investigation, that Mr. Malone apparently handled the physical evidence that was submitted for forensic testing, or evidence of communications between USDOJ and the State. Consequently, the Court finds Defendant has failed to meet its burden and establish that a *Brady* violation occurred. **No relief is warranted on claim V.**

CLAIM VI

Mr. Bolin Suffered Ineffective Assistance of Counsel as a Result of His Counsel's Failure to Raise a Confrontation Clause Objection to the Admission of Evidence of Michael Malone's Forensic Testing Through a Surrogate Analyst When the State Never Made a Showing That Malone Himself Was Unavailable.

Allegations and Response

In claim VI, Defendant asserts counsel performed deficiently by failing to raise a confrontation objection to the admission of the aforementioned hair analysis testimony through a surrogate analyst. Specifically, Defendant asserts that at the time of the instant trial, Mr. Malone had retired from the FBI and was the subject of an investigation. Defendant asserts the State therefore used a surrogate analyst "to testify to the bench notes, reports, testing, and findings performed by Malone." Although the surrogate examiner reviewed Mr. Malone's work, he testified that if Mr. Malone had made an error or false entry in his bench notes, a substitute examiner would have no way of knowing whether anything was falsified. Defendant asserts the State failed to establish that Mr. Malone was unavailable. Defendant further asserts he had no meaningful opportunity to previously cross-examine Mr. Malone in light of the subsequent investigation into his misconduct. Defendant cites to *Crawford v. Washington*, 541 U.S. 36 (2004) and *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) in support of his claim. Defendant claims that if counsel had objected, the evidence would have been excluded and the verdict would have been different.

The State first contends that Agent Fram was not a surrogate analyst as alleged because Fram "independently exercised his own interpretation and training in personally conducting the hair comparisons in this case" and did not merely recite Mr. Malone's findings. The State further argues that *Bullcoming* was not issued until 2011 and therefore counsel cannot be deemed ineffective for failing to anticipate changes in the law; even if counsel had objected it would have been overruled. The State asserts there was no *Crawford* confrontation violation where Agent Fram conducted his own analysis and testified. The State also notes counsel had an opportunity to cross-examine Mr. Malone, who testified during the 1991 trial. Although Malone placed the hair from the towel onto the slide that was tested by Agent Fram, the State argues that is not a Confrontation Clause violation. The State argues that because counsel had no basis to object to Agent Fram's testimony, therefore, counsel was not ineffective.

Findings of Fact and Conclusions of Law

In *Crawford*, the Court held that the admission of testimonial hearsay statements violates the Confrontation Clause unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine that witness. *See Crawford*, 541 U.S. at 68. Additionally, in *Bullcoming*, the Court explained,

> The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.

Bullcoming, 131 S. Ct. at 2710.

During the September 3, 2015 evidentiary hearing, Defendant did not present any testimony or evidence as to this claim. Defendant failed to present any evidence as to Mr. Malone's availability. Additionally, Defendant acknowledges in his motion and closing argument that Mr. Malone testified and was subject to cross-examination in Defendant's prior trial. Although Defendant alleges he did not have a meaningful opportunity to cross-examine Mr. Malone because such cross-examination occurred prior to the OIG report, the Court notes "the Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Bolin*, 117 So. 3d at 735. As Defendant has failed to demonstrate that a Confrontation Clause violation occurred, the Court finds Defendant has failed to demonstrate that counsel was ineffective for failing to object based on *Crawford* or that that outcome of the proceeding would have been different had counsel objected.

The Court further finds Defendant has failed to establish that counsel performed deficiently in failing to object to the State's use of Mr. Fram or that the result of the proceeding would have been different had counsel objected where Mr. Fram did not testify to the result of Mr. Malone's testing but conducted his own examination and analysis of the evidence. At trial, FBI Analyst Robert Fram testified that he performed a microscopic comparison of the hairs collected from the towel by Mr. Malone (or his technician) and Defendant's known hair, and concluded that one of the hairs from the towel exhibited the same microscopic characteristics as Defendant's hair and was consistent with originating from Defendant. (Trial Tr. v. 5, pp. 578-82, 594). Consequently, Mr. Fram was not a surrogate analyst as identified in *Bullcoming*. Finally, the Court notes that *Bullcoming* was not issued until 2011. Therefore, Defendant has also failed to demonstrate that counsel was deficient in failing to object based on *Bullcoming*. *See Seibert v. State*, 64 So. 3d 67,

82 (Fla. 2010) ("[I]t is well-settled that trial counsel cannot be deemed ineffective for failing to anticipate a change in the law.").

Based on the foregoing, no relief is warranted on claim VI.

It is therefore **ORDERED AND ADJUDGED** that claims I, III, IV, V and VI of Defendant's motion are each hereby **DENIED.**

This is a final, appealable order. Defendant has thirty days from the date of rendition to appeal.

DONE AND ORDERED in Chambers in Hillsborough County, Florida this 17th day of November, 2015.

MICHELLE SISCO
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this order has been furnished to Bjorn Brunvand, Esquire, 615 Turner St., Clearwater, FL 33756, by U.S. mail; Christopher LaBruzzo, Esquire, Office of the State Attorney, PO Box 5028, Clearwater, FL 33758, and to Stephen Ake, Esquire, Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607; on this _____ day of November, 2015.

Deputy Clerk